Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-34–04 OF 2014(S) AND 02–35–04 OF 2014(S)
RAUS SHARIF PCA, AHMAD MAAROP, HASAN LAH, ABU SAMAH NORDIN FCJJ AND AZIAH ALI JCA
19 JANUARY 2017

Legal Profession — Practice of law — Whether foreign counsel could appear in arbitration proceedings — Whether s 8(1) of the Advocates Ordinance 1953 ('the Ordinance') prohibited foreign lawyers not advocates within meaning of Ordinance from representing parties to arbitration proceedings in Sabah — Whether s 2(1)(a) and (b) of the Ordinance merely defined phrase 'to practise in Sabah' and did not create substantive rights — Whether s 8(1) of the Ordinance only allowed Sabah advocates the right to practise law in Sabah

The question of law before the Federal Court in the instant case was whether s 8(1) of the Advocates Ordinance 1953 (Cap 2) ('the Ordinance') read together with s 2(1)(a) and (b) thereof, gave Sabah advocates the exclusive right to represent and appear on behalf of any party in arbitration proceedings in Sabah. During the course of arbitration proceedings in Sabah between the appellants in the first appeal herein ('the claimants') and another party ('BSSB'), the claimants objected to the appointment of a Kuala Lumpur-based lawyer as co-counsel for BSSB, saying he had to obtain ad hoc admission to the Sabah Bar first before he could act for BSSB. This prompted the respondent in the appeals herein (who was then practising in the law firm that represented BSSB) to seek a declaration from the High Court that the Ordinance did not prohibit foreign lawyers who were not advocates within the meaning of the Ordinance from representing parties to arbitration proceedings in Sabah and that the Ordinance had no application to arbitration proceedings in Sabah. The High Court ruled against the respondent holding that foreign lawyers who were not advocates within the meaning of the Ordinance could not represent parties to arbitration proceedings in Sabah; that the phrase 'exclusive right to practice in Sabah' in s 8 of the Ordinance meant only lawyers admitted to the Sabah Bar had the exclusive right to practise both 'in and outside' courts; that anyone who was not a member of the Sabah Bar had to apply for ad hoc admission to the local Bar first before he could carry out the work of an advocate. The Court of Appeal ('the COA') allowed the respondent's appeal, reversed the High Court's decision and held that nothing in the Ordinance provided that only advocates admitted in Sabah had the exclusive right to represent parties in arbitration proceedings in Sabah. The COA held that by reason of the definition of the words 'to practise in Sabah' in s 2(1) of the

Ordinance, 'the exclusivity of right to practise for advocates in Sabah is tied up to the exclusive right of practice of barristers and solicitors in England' and that since barristers and solicitors in England had no exclusive right to represent parties in arbitration proceedings in England, advocates in Sabah also had no exclusive right of representation in arbitration proceedings in Sabah. Section 2(1)(a) and (b) of the Ordinance defined the phrase 'to practise in Sabah' as the carrying out in Sabah of any of the functions which in England might be performed by either a member of the English Bar or a solicitor of the Supreme Court of Judicature. Section 8(1) of the Ordinance provided, inter alia, that 'advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation'.

Held, allowing the appeals, answering the question of law posed in the affirmative, setting aside the decision of the Court of Appeal and reinstating the decision of the High Court:

(1) Under the Ordinance, the exclusive right to practise in Sabah was conferred on Sabah advocates by s 8(1). As such, s 8(1) had to be read with s 2(1)(a) and (b) of the Ordinance. Section 2(1)(a) and (b) were merely definition provisions and did not create any substantive rights. They merely defined the phrase 'to practise in Sabah' which appeared in the first limb of s 8(1) of the Ordinance to mean to perform any of the functions that might be performed by the barristers and solicitors in England regardless of whether those functions were exclusive or non-exclusive. Exclusivity or non-exclusivity was never part of the definition. Exclusivity and functions were two separate issues. Exclusivity did not in itself form part of the function to be performed (see paras 33–34).

(2) By virtue of the first limb of s 8(1) of the Ordinance, the Sabah advocates had exclusive right to represent a party in arbitration proceedings in Sabah. This statutory right given to the Sabah advocates could not be taken away by relying merely on the fact that barristers and solicitors in England had non-exclusive right to appear for parties in arbitration proceedings which should form part of the functions included in the phrase 'to practise in Sabah'. This court therefore agreed with the High Court's conclusion that foreign lawyers who were not advocates within the meaning of the Ordinance were prohibited by the same from representing parties to arbitration proceedings in Sabah (see para 35).

(3) The Court of Appeal erred in not reading s 2(1)(a) and (b) of the Ordinance together with s 8(1) which conferred the exclusive right to Sabah advocates to practise in Sabah. The Court of Appeal erred in tying

A the non-exclusive right of barristers and solicitors in England to appear for parties in arbitration proceedings with the practice in Sabah as there was an express statutory provision in the Ordinance to the contrary (see para 36).

B **[Bahasa Malaysia summary**

Persoalan undang-undang di hadapan Mahkamah Persekutuan dalam kes ini adalah sama ada s 8(1) Ordinan Peguamcara 1953 (Bab 2) ('Ordinan tersebut') dibaca bersama s 2(1)(a) dan (b) yang sama, memberikan peguamcara Sabah hak eksklusif untuk mewakili dan hadir bagi pihak mana-mana pihak dalam
C prosiding timbang tara di Sabah. Sepanjang prosiding timbang tara di Sabah antara perayu-perayu dalam rayuan pertama ('penuntut-penuntut') dan satu lagi pihak ('BSSB'), penuntut-penuntut membantah terhadap pelantikan peguamcara dari Kuala Lumpur sebagai peguam bersama untuk BSSB, dengan menyatakan dia perlu mendapatkan kemasukan ad hoc ke dalam Majlis
D Peguam Sabah terlebih dahulu sebelum dia boleh bertindak untuk BSSB. Ini menyebabkan responden dalam rayuan-rayuan di sini (yang mana pada masa itu beramal dalam firma guaman yang mewakili BSSB) untuk memohon deklarasi daripada Mahkamah Tinggi bahawa Ordinan tersebut tidak melarang peguam asing yang bukan peguamcara dalam maksud Ordinan tersebut
E daripada mewakili pihak-pihak kepada prosiding timbang tara di Sabah dan bahawa Ordinan tersebut tiada pemakaian kepada prosiding timbang tara di Sabah. Mahkamah Tinggi tidak menyebelahi responden dengan memutuskan bahawa peguam asing yang bukan peguamcara dalam maksud Ordinan tersebut tidak boleh mewakili pihak-pihak kepada prosiding timbang tara di
F Sabah; bahawa ungkapan 'exclusive right to practice in Sabah' dalam s 8 Ordinan tersebut hanya bermaksud peguam yang diterima masuk Majlis Peguam Sabah mempunyai hak eksklusif untuk beramal kedua-dua 'in and outside' mahkamah; bahawa sesiapa yang bukan ahli Majlis Peguam Sabah perlu memohon untuk kemasukan ad hoc ke dalam Majlis Peguam tempatan
G terlebih dahulu sebelum dia boleh menjalankan tugas sebagai peguamcara. Mahkamah Rayuan ('MR') membenarkan rayuan responden, mengakas keputusan Mahkamah Tinggi dan memutuskan tiada apa-apa dalam Ordinan tersebut memperuntukkan bahawa hanya peguamcara yang diterima masuk di Sabah mempunyai hak eksklusif untuk mewakili pihak-pihak dalam prosiding
H timbang tara di Sabah. MR memutuskan bahawa oleh sebab definisi perkataan-perkataan 'to practice in Sabah' dalam s 2(1) Ordinan tersebut, 'the exclusivity of right to practise for advocates in Sabah is tied up to the exclusive right of practice of barristers and solicitors in England' dan bahawa oleh kerana peguambela dan peguamcara di England tidak mempunyai hak eksklusif
I untuk mewakili pihak-pihak dalam prosiding timbang tara di England, peguamcara di Sabah juga tidak mempunyai hak eksklusif pewakilan dalam prosiding timbang tara di Sabah. Seksyen 2(1)(a) dan (b) Ordinan tersebut mentafsir ungkapan 'to practice in Sabah' sebagai menjalankan di Sabah apa-apa fungsi yang mana di England boleh dilaksanakan oleh sama ada ahli

Majlis Peguam Inggeris atau peguambela Mahkamah Agong Kehakiman. Seksyen 8(1) Ordinan tersebut memperuntukkan, antara lain, bahawa 'advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation'.

Diputuskan, membenarkan rayuan-rayuan, menjawab persoalan undang-undang yang dikemukakan secara positif, mengetepikan keputusan Mahkamah Rayuan dan mengembalikan keputusan Mahkamah Tinggi:

(1) Di bawah Ordinan tersebut, hak eksklusif untuk beramal di Sabah diberikan ke atas peguamcara Sabah oleh s 8(1). Oleh itu, s 8(1) perlu dibaca dengan s 2(1)(a) dan (b) Ordinan tersebut. Seksyen 2(1)(a) dan (b) hanya peruntukan tafsiran dan tidak memberikan apa-apa hak substantif. Ungkapan 'to practice in Sabah' yang hanya ditafsirkan yang terdapat di cabang pertama s 8(1) Ordinan tersebut untuk bermaksud melaksanakan apa-apa fungsi yang boleh dilaksanakan oleh peguambela dan peguamcara di England tidak kira sama ada fungsi-singsi tersebut adalah eksklusif atau tidak eksklusif. Sifat eksklusif atau tidak eksklusif bukan sebahagian daripada tafsiran itu. Sifat eksklusif dan fungsi-fungsi adalah dua isu berasingan. Sifat eksklusif tidak dengan sendiri membentuk sebahagian daripada fungsi itu untuk dilaksanakan (lihat perenggan 33–34).

(2) Menurut cabang pertama s 8(1) Ordinan tersebut, peguamcara Sabah mempunyai hak eksklusif untuk mewakili pihak dalam prosiding timbang tara di Sabah. Hak statutori ini yang diberikan kepada peguamcara Sabah tidak boleh diambil dengan hanya bergantung kepada fakta bahawa peguambela dan peguamcara di England tidak mempunyai hak eksklusif untuk mewakili bagi pihak-pihak dalam prosiding timbang tara yang patut membentuk sebahagian daripada fungsi-fungsi yang termasuk dalam ungkapan 'to practice in Sabah'. Mahkamah ini dengan itu bersetuju dengan kesimpulan Mahkamah Tinggi bahawa peguam asing yang bukan peguamcara dalam maksud Ordinan tersebut dilarang oleh yang sama daripada mewakili pihak-pihak kepada prosiding timbang tara di Sabah (lihat perenggan 35).

(3) Mahkamah Rayuan terkhilaf kerana tidak membaca s 2(1)(a) dan (b) Ordinan tersebut bersama s 8(1) yang memberikan hak eksklusif kepada peguamcara Sabah untuk beramal di Sabah. Mahkamah Rayuan terkhilaf dalam mengaitkan hak tidak eksklusif peguambela dan peguamcara di England untuk mewakili bagi pihak-pihak dalam prosiding timbang tara dengan amalan di Sabah kerana terdapat peruntukan statutori yang jelas dalam Ordinan tersebut yang bertentangan (lihat perenggan 36).]

Notes

For cases on whether foreign counsel could appear in arbitration proceedings, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1805–1807.

Cases referred to

In the Matter of Enactment No 10 of 1922, The Judgments (Reciprocity) Enactment; Ho Hong Bank Ltd v Ho Kai Neo & Another [1932] 1 MLJ 76, (refd)

Zublin Muhibbah Joint Venture v Government of Malaysia [1990] 3 MLJ 125, HC (not folld)

Legislation referred to

Advocates Ordinance 1953 (Cap 2) ss 2, 2(1), (1)(a), (1)(b), 8, 8(1)
Arbitration Act 1996 [UK] s 36
Arbitration Act 2005
Legal Profession Act 1976 ss 35(1), 36(1)
Procedure Ordinance 1926 ss 18, 19

Appeal from: Civil Appeal No S-02–3304 of 2010 (Court of Appeal, Kota Kinabalu)

Alex Decena (Christina Liew and Sherzali H Asli with him) (CJ Liew & Co) in Civil Appeal No 02(f)-34–04 of 2014(S) for the appellants.
Stephen Foo (John Sikayun and Gaanesh Nandy with him) (Luping & Co) in Civil Appeal No 02–35–04 of 2014(S) for the appellant.
Ho Kin Kong (Ho Chong Yong) in Civil Appeal Nos 02(f)-34–04 of 2014(S) and 02–35–04 of 2014(S) for the respondent.

Hasan Lah FCJ:

INTRODUCTION

[1] These are two related appeals before us which were jointly heard as they arose from the same judgment of the Court of Appeal and involved same issue of law. The appeals are against the decision of the Court of Appeal dated 24 September 2012 which allowed the respondent's appeal with costs by reversing the decision of the High Court given on 26 October 2010. Leave to appeal was granted by this court on 24 March 2014 on the following question of law:

> Whether section 8(1) of the Advocates Ordinance 1953 (Sabah Cap 2) read together with section 2(1)(a) and (b) thereof confer exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in the State of Sabah to Sabah Advocates notwithstanding that Barristers and Solicitors in England do not have the exclusive right of representation in arbitration proceedings?

[2] The learned High Court judge held that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 ('the Ordinance') are prohibited by the Ordinance from representing parties to arbitration proceedings in Sabah. The Court of Appeal, on the other hand, held that the Sabah advocates have no exclusive right of representation at arbitration proceedings in the state of Sabah.

[3] We heard the appeals on 7 December 2015 and at the conclusion of the hearing we unanimously allowed the appeals and with the consent of all the parties no order was made on the costs of the appeals.

[4] We had indicated to the parties that we would give our full written judgment later. We now give our grounds for the decision.

BACKGROUND FACTS

[5] The facts relevant to these appeals are as follows. The appellants in Case No 34, comprising more than 800 smallholders/claimants to Bagahak Scheme ('the claimants') entered into a joint venture agreement with a company known as Borneo Samudera Sdn Bhd ('BSSB').

[6] The claimants had surrendered their respective interests in land lots in the scheme to a joint venture company in exchange for shares in a joint venture company formed under the joint venture agreement.

[7] The shareholders in the joint venture company comprised of the claimants of the one part and BSSB on the other part. Subsequently a dispute between the parties arose out of the joint venture agreement. Their dispute went for arbitration. The seat of the arbitration was in Sabah.

[8] The claimants were represented by Messrs CJ Liew & Co. Mr Alex Decena acted as counsel for the claimants. BSSB was represented by Messrs Ho Chong Yong. Mr Ho Kin Kong acted as counsel for BSSB. In addition, BSSB had also appointed one Mr Lam Ko Luen, a partner of Messrs Shook Lin & Bok, Kuala Lumpur to act as co-counsel together with Mr Ho Kin Kong.

[9] On or around August 2009, the claimants and BSSB appointed Mr Michael Hwang SC, a Singapore based Chartered Arbitrator and lawyer as the sole arbitrator.

[10] During the course of the arbitration, the claimants raised an issue that Mr Lam Ko Luen was required to obtain ad hoc admission to the Sabah Bar if he wished to appear at the arbitration hearing in Kota Kinabalu.

[11] An application was made on 3 September 2010 vide Originating Summons No K17–29 of 2010 by the respondent (Mohamed Azahari bin Matiasin), who was practicing in the firm of Messrs Ho Chong Yong, for, inter alia, a declaration that foreign lawyers who are not advocates within the meaning of the Ordinance are not prohibited by the Ordinance from representing parties to arbitration proceedings in Sabah and that the Ordinance has no application to arbitration proceedings in Sabah.

[12] The learned High Court judge held that foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited from representing parties to arbitration proceedings in Sabah. The learned High Court judge made the following observation:

> Reverting to the issue at hand, I must follow the established rule of interpreting statutes and that is to give the words contained therein their natural meaning and construe that provision in the context of the whole statute. Applying that trite principle to words employed in s 8 of the Ordinance, I have no hesitation in holding and do hold that the phrase 'exclusive right to practice in Sabah' means that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. In short, if someone who is not a member of the Sabah Bar wishes to carry out works similar to that of an advocate, he must apply for ad hoc admission to the local Bar ...

[13] The respondent appealed against the decision of the High Court to the Court of Appeal. On 29 September 2012 the Court of Appeal allowed the appeal. The Court of Appeal held that there was nothing in the Ordinance that stated that advocates admitted in Sabah have the exclusive right to represent parties at arbitration proceedings in the State of Sabah.

SUBMISSIONS FOR THE PRESIDENT OF THE SABAH LAW ASSOCIATION

[14] The phrase 'to practise in Sabah' is defined in s 2 of the Ordinance as to perform in Sabah:

> (a) any of the functions which in England may be performed by a member of the Bar as such; or
>
> (b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such;

[15] Section 8(1) of the Ordinance provides that:

> 8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation:

...

[16] Learned counsel for the President of the Sabah Law Association submitted that s 2(1)(a) and (b) of the Ordinance is merely a definition provision and it does not create any substantive right. It has to be read with s 8(1) of the Ordinance which is the very provision conferring exclusive right on Sabah advocates to practise in Sabah. Since appearance in arbitration proceedings is one of the functions performed by English barristers and solicitors, by virtue of the definition of the expression 'to practise in Sabah' it was submitted that to appear in arbitration proceedings in Sabah is 'to practise in Sabah'. Thus, by virtue of s 8 of the Ordinance, Sabah advocates have exclusive right to appear in arbitration proceedings as conferred by that section.

[17] Learned counsel for the President of the Sabah Law Association also submitted that English barristers and solicitors have no exclusive right to appear in arbitration proceedings in England by virtue of s 36 of the UK Arbitration Act 1996 and that provision does not apply to Sabah or Malaysia. There is also no similar provision in our Arbitration Act 2005. It was therefore submitted that the Court of Appeal erred when it made the following observation in its judgment:

> ... We agree with the submission of the appellant that by reason of the definition of the words 'to practise in Sabah' in s 2(1) of the Advocates Ordinance in Sabah, the exclusivity of right to practise for advocates in Sabah is tied up to the exclusive right of practice of barristers and solicitors in England; and since barristers and solicitors in England have no exclusive right of representation before arbitration proceedings in England, it follows, therefore, that advocates of Sabah also have no exclusive right of representation at arbitration proceedings in the State of Sabah.

[18] It was submitted also that the Court of Appeal erred in adopting a law providing for non-exclusivity in England which had no application in Sabah and applied it to Sabah advocates. The Court of Appeal had erred in applying a provision in the UK Arbitration Act 1996 to override a clear and express provision of s 8(1) of the Ordinance.

[19] Learned counsel for the President of the Sabah Law Association contended that s 8(1) of the Ordinance consists of two limbs. The first limb is 'to practise in Sabah' and the second limb is 'to appear and plead in the the Federal Court in Sabah and in the High Court and in all courts in Sabah subordinate thereto which advocates may appear ...'. Both limbs are preceded by the words 'shall have exclusive rights'. That means Sabah advocates shall have 'exclusive right to practise in Sabah' as well as 'exclusive right to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in

Sabah subordinate thereto which advocates may appear'. The Sabah advocates therefore have exclusive right to represent a party in arbitration proceedings in Sabah.

[20] It was further submitted that the Court of Appeal had erred by merely relying on s 2(1) of the Ordinance, which is a definition section and ignored s 8(1) of the Ordinance which confers the exclusive right on Sabah advocates to practise in Sabah.

[21] In the circumstances it was submitted that the question of law posed in these appeals should be answered in the affirmative and the appeals should be allowed.

SUBMISSIONS FOR THE CLAIMANTS

[22] Basically the submissions of learned counsel for the claimants were similar to the submissions of learned counsel for the President of the Sabah Law Association. Firstly, it was submitted that s 2(1)(a) and (b) of the Ordinance is a definition provision. It cannot create substantive law. It is used as an aid to interpreting s 8(1) of the Ordinance, a substantive provision. The court should read the Ordinance as a whole and adopt a purposive interpretation to discover the Legislature's policy or object in enacting the Ordinance. By the purposive approach, the phrase 'shall have the exclusive right to practise in Sabah' in s 8(1) of the Ordinance means that advocates in Sabah 'have the exclusive rights to legal practice in both 'in and outside' courts' as held by the High Court judge.

[23] Secondly, it was submitted that s 2(1)(a) and (b) of the Ordinance used the word 'functions' for barristers and solicitors in England and not the word 'practise' as used in s 8(1) of the Ordinance. But barristers' and solicitors' functions must depend on their right to practise in different areas of laws in England. It is in this sense that the word 'functions' in s 2(1)(a) and (b) of the Ordinance should be understood. It was also submitted that s 2(1)(a) and (b) of the Ordinance cannot be wholly relied upon to interpret s 8(1) of the Ordinance because the practice of advocates in Sabah and the functions or practice of barristers and solicitors in England are different.

SUBMISSIONS OF THE RESPONDENT

[24] Firstly, it was submitted that effect has to be given to the special meaning of the phrase 'to practise in Sabah' under s 2(1) of the Ordinance which refers to barristers and solicitors in England who had never enjoyed such exclusivity of practice where arbitration was concerned. This was the position in England before the coming into force of s 36 of the English Arbitration Act

1996 (see *The Law and Practice of Commercial Arbitration in England* (2nd Ed) by Mustill & Boyd (1989) at p 303). A

[25] Secondly, it was submitted that the phrase 'exclusive right to practise in Sabah' and the phrase 'to appear and plead in the Federal Court …' in s 8(1) of the Ordinance must be read conjunctively and not disjunctively by virtue of the word 'and' therein, in light of accepted principles of statutory interpretation. In support of that learned counsel cited the case of *In the Matter of Enactment No 10 of 1922, The Judgments (Reciprocity) Enactment; Ho Hong Bank Ltd v Ho Kai Neo & Another* [1932] 1 MLJ 76. B C

[26] The respondent also relied on the decision of the High Court in *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 125 to support his argument that advocates in Sabah did not have exclusive right to appear in arbitration proceedings. In that case, which concerned with arbitration proceedings in West Malaysia, the court was asked to interpret ss 35(1) and 36(1) of the Legal Profession Act 1976. The court held that in West Malaysia a person representing a party in an arbitration proceedings need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and the Legal Profession Act 1976 has no application to an arbitration proceedings in West Malaysia. D E

[27] Thirdly, it was submitted that the Ordinance was only intended to apply to representations in court and not arbitration. According to learned counsel for the respondent, prior to the unification of the High Court of Sabah and the High Court of Sarawak, the relevant legislation that governed the practice of law in Sabah was, in particular, ss 18 and 19 of the Procedure Ordinance 1926. As such the Ordinance, which was intended to replace ss 18 and 19 of the Procedure Ordinance 1926, was therefore intended to apply only to representations in court and not arbitration. F G

[28] Finally, it was submitted that it was important for the court to take a liberal or purposive approach in deciding the issue or to be in tandem with international practice which allowed parties to be represented by non-lawyers in arbitration. H

DECISION OF THIS COURT

[29] We would like to touch first on the case of *Zublin Muhibbah* which was relied upon by the respondent to support his argument that the Sabah advocates have no exclusive rights to represent parties in arbitration proceedings in Sabah. The learned High Court judge held that that case was not applicable to the issue before the court as relevant provisions under the Legal Profession Act 1976 and the Ordinance are different. The Court of I

Appeal agreed with the High Court. We also agreed with the decisions of the courts below that *Zublin Muhibbah* was not relevant to the issue in this case.

[30] With regard to the position of barristers and solicitors in England we agreed with learned counsel for the respondent that representation of parties in arbitration in England was never the exclusive domain of barristers and solicitors in England. Section 36 of the English Arbitration Act 1996 was a codification of the common law position (see *Law and Practice of International Commercial Arbitration* (4th Ed), by Redfer & Hunter (2004) at pp 317–318).

[31] On the construction of ss 2(1)(a) and (b) and 8(1) of the Ordinance, the High Court judge, inter alia, ruled that the meaning given to the phrase 'to practise in Sabah' under s 2(1) of the Ordinance had no bearing on the issue before the court because the non-exclusivity of barristers' and solicitors' appearance in arbitration proceedings in England was not relevant to the issue before the court which concerned the exclusivity of legal practice in Sabah.

[32] The Court of Appeal, on the other hand, relied on the definition of the phrase 'to practise in Sabah' and ruled that the exclusivity of the right to practice for advocates in Sabah tied up to the exclusivity of the right of practice of barristers and solicitors in England.

[33] Having carefully considered the two provisions under the Ordinance we agreed with learned counsel for the appellants that since s 2(1)(a) and (b) is merely a definition provision it does not create any substantive right. In *Statutory Interpretation — A Code* (2nd Ed) by FAR Binnion, at p 416, the learned author stated as follows:

> *Definition with substantive effect.* It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively to confine it to the proper function of a definition.

[34] Under the Ordinance the exclusive right to practise in Sabah is conferred on Sabah advocates by s 8(1). As such s 8(1) has to be read with s 2(1)(a) and (b) of the Ordinance. As mentioned earlier s 2(1)(a) and (b) merely defines the phrase 'to practise in Sabah' which appears in the first limb of s 8(1) of the Ordinance to mean to perform any of the functions that may be performed by the barristers and solicitors in England regardless of whether those functions are exclusive or non-exclusive. Exclusivity or non-exclusivity is never part of the definition. Exclusivity and functions are two separate issues. Exclusivity does not in itself form part of the function to be performed.

[35] In our view, by virtue of the first limb of s 8(1) of the Ordinance, the Sabah advocates have exclusive right to represent a party in arbitration proceedings in Sabah. This statutory right given to the Sabah advocates cannot be taken away by relying merely on the fact that barristers and solicitors in England have non-exclusive right to appear for parties in arbitration proceedings, which should form part of the functions included in the expression phrase 'to practise in Sabah'. We therefore agreed with the conclusion of the High Court judge that foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited by the same from representing parties to arbitration proceedings in Sabah.

[36] We also agreed with learned counsel for both the appellants that the Court of Appeal had erred by not reading s 2(1)(a) and (b) of the Ordinance together with s 8(1) which confers the exclusive right to Sabah advocates to practise in Sabah. The Court of Appeal erred in tying the non-exclusive right of barristers and solicitors in England to appear for parties in arbitration proceedings with the practice in Sabah as there is an express statutory provision in the Ordinance to the contrary.

[37] For the reasons given we answered the question posed in the affirmative. The decision of the Court of Appeal was set aside and the decision of the High Court was reinstated.

Appeals allowed, question of law posed answered in the affirmative, decision of the Court of Appeal set aside and decision of the High Court reinstated.

Reported by Ashok Kumar